Supreme Court, U.S.
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No. 98-37

In The

Supreme Court of the United States

October Term, 1997

PAUL TALANDA,

Petitioner,

vs.

KFC NATIONAL MANAGEMENT COMPANY, a Delaware corporation, doing business as KFC, also known as KENTUCKY FRIED CHICKEN, a Delaware Corporation and a subsidiary of PEPSICO, INC., a North Carolina Corporation,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the courts of appeals have uniformly erred in requiring an individual who claims to be opposing employer conduct that he believes violates the Americans With Disabilities Act of 1990 ("ADA") or other anti-discrimination statutes to show that his belief is reasonable in order to pursue a claim?

2. Whether this Court should grant certiorari to review the scope of the ADA's protection against retaliation in this case, where the petitioner was not the object of the alleged discrimination, the alleged discriminatory act was a lateral transfer of one of his subordinates to a position she preferred, the petitioner did not communicate his suspicion that the transfer might be discriminatory to his employer, and the district court found that not only his purported belief that the transfer was discriminatory, but also his means of opposing it, were unreasonable as a matter of law?

STATEMENT PURSUANT TO RULE 29.6

As a result of corporate reorganizations that have occurred since the case was filed, Respondent KFC National Management Company is now a wholly owned subsidiary of KFC Corporation, which is wholly owned by Kentucky Fried Chicken Corporation, which is a wholly owned subsidiary of TRICON Global Restaurants, Inc. Respondent KFC National Management Company has no subsidiaries which are not wholly owned. Pepsico, Inc. no longer has an ownership role in any of the foregoing corporate entities.

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STATEMENT OF THE CASE

A. Nature Of The Case

Petitioner Paul Talanda ("Talanda"), a veteran store manager for Respondent KFC National Management Company ("KFC"), brought suit under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, *et seq.*, and in particular 42 U.S.C. § 12203(a), alleging that KFC had terminated his employment in retaliation for his alleged opposition to disability-based discrimination against a store employee. Talanda had been terminated for insubordination because he had not complied with a direct order from his immediate supervisor, Joanne Overly, to shift a new employee, Dorothy Bellson, from a front counter customer service position to a food preparation position. At the time, Bellson was missing several front teeth, and Overly was concerned that customers ordering food might react adversely to her appearance. Talanda maintained in his suit that he believed Overly's order to be discriminatory and that his discharge for disobeying it constituted unlawful retaliation for opposing discrimination prohibited by the ADA. The United States District Court for the Northern District of Illinois granted summary judgment in favor of KFC, and the United States Court of Appeals for the Seventh Circuit affirmed.

B. Facts Relevant To The Issues Presented For Review

KFC believes that the facts were correctly stated in the Report and Recommendations of the Magistrate Judge, which in this respect was accepted and adopted by the district court. App. at 18-26, 62. KFC will limit this discussion to those aspects of Petitioner's Statement of Facts which are inaccurate, misleading or incomplete.

Talanda repeatedly refers to Bellson as a "cosmetically disfigured" employee, or as having a "facial disfigurement," in

a calculated effort to imply that Bellson obviously had a substantial limitation or handicap. In fact, Bellson was simply missing several teeth as a result of a recent auto accident. (R:50, ¶9).[1] She had a history of employment in fast food restaurants (R:50, Exh. C), and when she applied to Talanda's store in August 1993 she stated her preference to work as a "cook & prep" person — a position in which she would not have direct contact with customers. (*Id.*).

Instead, Talanda hired Bellson for a customer service position in September 1993. (R:50, ¶9). Overly, the district manager, visited the store soon thereafter and subsequently phoned Talanda to direct him to move Bellson from the service counter to a food preparation position in the kitchen area of the restaurant. (R:50, ¶10).

Initially, Talanda disregarded Overly's directive. A day or two later, Talanda secretly tape recorded a second telephone conversation in which he prodded Overly to reiterate her direction and then told her he would do as she asked. (R:50, ¶¶12,13). Talanda arranged a meeting with Bellson the next morning and played for her the tape recording of his conversation with Overly. (R:50, ¶15). About a week later, after confiding the details of the meeting to a store shift supervisor who then contacted Overly, Bellson told Overly that Talanda had tape recorded his conversation with Overly. Bellson also informed Overly that Talanda had attempted to enlist Bellson to sue KFC for discrimination, was badgering her about "making money off this deal," and told her that she would stay on the front line no matter what Overly said and despite Bellson's own request to be moved. (R:50, ¶¶20-23, Exh. D, ¶¶15-18). Contemporaneously, Overly was told by Ken Gand, another

1. References in this form are to the docket entries in the district court, especially the materials presented in support of and in opposition to KFC's motion for summary judgment.

manager in her territory, that Talanda had told Gand he "had something on [Overly]" that would get her fired. (R:50, ¶24). Meanwhile, Talanda continued to ignore Overly's directive but did not tell her that he believed it to be discriminatory or even that he had not followed it. (R:50, ¶¶14,18).

Talanda did not discuss Bellson with Overly again for almost three weeks, though he continued to have Bellson wait on customers. (R:50, ¶¶9,18,31).[2] In the interim, Overly learned of Talanda's recent insubordinate and potentially disruptive actions from Bellson and Gand. Overly brought these developments and other recent issues concerning Talanda's performance to the attention of John Malloy, KFC's Division Human Resources Director. (R:50, ¶¶ 19, 23).

Talanda was asked to meet with Malloy and Overly on October 19, 1993. The purpose of the meeting with Malloy was to provide Talanda with an opportunity to explain his acts of insubordination before a final decision was made concerning his possible termination. (R:50, ¶25). Although given the opportunity, Talanda offered no explanation at the meeting for his failure to follow Overly's direction, but simply asked Malloy if he was being terminated. (R:50, ¶26; Exh. D, pp. 274-275). Because Talanda had offered no mitigating explanation for his behavior, Malloy and Overly decided to terminate Talanda after the meeting. (R:50, ¶¶29,30). As both the Magistrate Judge and the District Court noted, at no time did Talanda inform Overly or Malloy that he believed Overly's directive to move Bellson might violate the ADA. (R:50, ¶31; R:71, ¶31).

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2. Talanda maintained in the district court that, in order to comply with Overly's directive, he would have had to displace a more senior employee. At his Illinois unemployment compensation hearing, however, he had conceded under oath that in the KFC system employees are supposed to work at all positions and that he could have honored Overly's request to move Bellson if he had wanted to. (R:71, Exh. I, pp. 12-14).

Petitioner notes his successful employment record with KFC. In fact, during his fifteen years with KFC Talanda had become a Training Store Manager responsible for training assistant managers to become managers and for giving orientation classes to new employees. (R:50, ¶¶4, 6.) KFC's handbooks for both managers and employees explained that an employee who wished to voice a concern or disagree with a superior's decision and who felt unable to discuss the matter with his or her supervisor should contact the Division Human Resources Representative and could, as a further alternative, submit that concern to corporate headquarters on preprinted, postage paid OPEN DOOR mailer forms available in each store. (R:50, ¶32). Thus, Talanda knew that there were KFC resources other than Overly to whom he could turn to report perceived discrimination or to ask for guidance as to whether Overly's directive violated the ADA. (R:50, ¶32). Yet Talanda, who had for years taught company policies to others and who admitted he did not have an understanding of what would constitute a protected disability and had no idea whether Overly's instructions actually violated the ADA, did not seek assistance of any sort from such sources. (R:50, ¶¶7,17, 32).

In granting summary judgment, the district court focused on the first element of a *prima facie* case of retaliation, the requirement that a plaintiff prove that he engaged in statutorily protected expression. Drawing upon principles developed primarily under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, the district court observed that statutory protections against retaliation are not absolute, but rather protect only the plaintiff who has a reasonable belief that he is opposing discrimination. The district court then held that Talanda's conduct was not protected under the ADA because it was doubly unreasonable; his belief that the order he opposed was discriminatory was unreasonable, and his methods of opposing KFC's actions were also unreasonable.

The Seventh Circuit focused only on the first half of this analysis, declaring it to be

> a well-established principle that, to receive protection under the ADA, a plaintiff must have acted "in good faith and with a reasonable and sincere belief that he or she is opposing unlawful discrimination."

140 F.3d at 1096, quoting *Roth v. Lutheran General Hosp.*, 57 F.3d 1446, 1459 (7th Cir. 1995). The Seventh Circuit continued: "Specifically, in retaliation cases, whether under Title VII or the ADA, 'it is good faith and reasonableness, not the fact of discrimination, that is the critical inquiry.' " 140 F.3d at 1096, quoting *Rucker v. Higher Education Aids Bd.*, 669 F.2d 1179, 1182 (7th Cir. 1982). App. at 11-12.

In deciding whether Talanda could reasonably have believed that he was opposing unlawful discrimination against Bellson, the Seventh Circuit looked to the definitions given by the ADA and the EEOC's interpretive regulations to the term "disability" and its key component, an impairment that "substantially limits one or more of the major life activities". 42 U.S.C. § 12102(2)(A). The Court held that this threshold criterion was fatal to Talanda's case because it was necessarily unreasonable to believe that Bellson qualified for protection under the ADA. The Court referred to the EEOC regulations defining the most commonly implicated major life activities, in particular that of "working," and held that Talanda was unable to show

> that he reasonably believed that Bellson was, or was perceived by KFC as, "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities."

140 F.3d at 1096-1097, App. at 12-13. Petitioner now characterizes this analysis as creating a new "legal certainty" test (although the Seventh Circuit did not claim to be doing anything of the sort), and suggests that this holding may increase alleged inconsistency in the treatment of retaliation claims under Title VII and the ADA.

REASONS FOR DENYING THE WRIT

I.

THE SEVENTH CIRCUIT'S ANALYSIS OF THIS CASE IS IN HARMONY WITH A CONSISTENT BODY OF LAW REQUIRING A PLAINTIFF WHO CLAIMS RETALIATION FOR OPPOSING DISCRIMINATION TO HAVE A REASONABLE BELIEF THAT THE CONDUCT OPPOSED IS IN FACT UNLAWFUL.

Petitioner first asserts that there is disagreement among the circuits regarding the circumstances under which an individual who mistakenly believes that he or she is opposing workplace discrimination enjoys statutory protection against retaliation for that opposition. Presenting a selective list of cases, the vast majority of them decided in the 1980's under Title VII,[3] Petitioner argues that this asserted disharmony among the circuits is compounded by the new "legal certainty" test supposedly

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3. 42 U.S.C. § 2000e-3 makes it an unlawful employment practice "for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter. . . ." The core language parallels the ADA's anti-retaliation provision but, unlike the ADA formulation, protects only employees.

The Courts of Appeals have uniformly held that the anti-retaliation provisions of the ADA and Title VII should be read in identical fashion. *Krouse v. American Sterilizer Co.*, 126 F.3d 494 (3rd Cir. 1997); *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278 (11th Cir. 1997); *Soileau v. Guilford of Maine, Inc.*, 105 F.3d 12, 16 (1st Cir. 1997).

articulated in this case and that this confusion will chill legitimate opposition to discrimination.

This is, quite simply, a false alarm based upon an artificial classification. A careful review of Petitioner's authorities, which he cites without any discussion, reveals little substantive difference between the two principal camps into which Petitioner would divide the circuits: those applying what plaintiff terms an objective "reasonable person" standard[4] and those applying a "combination of the objective and subjective tests" to decide whether an individual who has acted upon an erroneous belief that he or she is opposing discrimination is protected from employer retaliation. However the test is phrased, the circuits have almost universally required a plaintiff claiming retaliation to show that his belief that he was opposing statutorily proscribed discrimination was reasonable under the circumstances.

For example, in *Parker v. Baltimore & Ohio Railroad Co.*, 652 F.2d 1012, 1020, 209 U.S. App. D.C. 215, 223 (D.C. Cir. 1981) a case that Petitioner describes as employing a purely objective standard, the Court said:

> The employer is sufficiently protected against malicious accusations and frivolous claims by a requirement that an employee seeking the protection of the opposition clause demonstrate *a good faith, reasonable belief* that the challenged practice violates Title VII.

Yet in *Meeks v. Computer Associates Intl.*, 15 F.3d 1013 (11th Cir. 1994), a case that Petitioner describes as employing a combination objective/subjective standard, the Court said:

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4. Petitioner's reference to a "reasonable person" standard is slightly inaccurate. Rather, the lower courts ask whether the Plaintiff possessed a "reasonable belief" that the challenged practice was unlawful.

> To recover for retaliation, the plaintiff "need not prove the underlying claim of discrimination which led to her protest," so long as she had a reasonable good faith belief that the discrimination existed.

15 F.3d at 1016, quoting *Tipton v. Canadian Imperial Bank of Commerce*, 872 F.2d 1491, 1494 (11th Cir. 1989). *See also Little v. United Technologies Inc.*, 103 F.3d 956, 959-960 (11th Cir. 1997). Plainly, these are the same standards. There is in fact no schism between the circuits, and while some courts may take more pains than others to stress the requirement of subjective good faith, objective reasonability of the belief is universally required.

By Petitioner's own count, only the First and Tenth Circuits require only a subjective good faith belief. But Petitioner's information is dated. The First Circuit has aligned itself with the more objective standard in *Wyatt v. City of Boston*, 35 F.3d 13, 15 (1st Cir. 1994), citing *Sias v. City Demonstration Agency*, 588 F.2d 692 (9th Cir. 1978), and *Bigge v. Albertsons, Inc.*, 894 F.2d 1497 (11th Cir. 1990), for the proposition that "a claim concerning the opposition clause requires that the employee have a reasonable belief that the practice the employee is opposing violates Title VII." The Tenth Circuit is also in step, stating in *Phelps v. Sears Roebuck and Co.*, 13 F.3d 406, 1993 WL 523202, **5 (10th Cir. 1993), that the "plaintiff need not prove that there was actual discrimination, but only that he or she had a reasonable, good faith belief that there was discrimination."

Not only is there no significant disagreement among the circuits, but the Seventh Circuit's analysis in this case is very much in keeping with the mainstream "reasonable belief" standard. The relevant statute is the Americans *With Disabilities* Act, in which Talanda had no special training. Talanda did not regard Bellson as disabled when he hired her. Nor did Overly regard Bellson as unable to work; she simply told Talanda to

assign her to a different position, and said her job assignment would not be an issue if she got her teeth fixed. (R:50, ¶13). Most importantly, Talanda admitted in his deposition that he had no idea whether Overly's order violated the ADA. (R:50, ¶¶ 7, 17). Taking into account all of these circumstances and Talanda's complete failure to raise the question to Malloy, other KFC Human Resources personnel or the Equal Employment Opportunity Commission (or to ask Bellson to make such inquiry), Talanda cannot plausibly assert that he had a reasonable belief that Overly's order was discriminatory.

Because he cannot meet the generally accepted standard, however, Petitioner appears to be asking this Court not to correct the Seventh Circuit's claimed departure from the norm, but to hold that even the universally accepted requirements of "reasonable belief" or "good faith belief" have no basis in applying 42 U.S.C. § 12203(a) because they do not appear in the statutory language. Petitioner apparently wishes to substitute a crude standard along the lines of whether "the protected activity at issue * * * [was] connected to the adverse employment action," which in fact begs the question of what activity is protected. Petition at 7. Petitioner overlooks, however, that both section 12203(a) of the ADA and its Title VII counterpart require on their face that the act or practice opposed be unlawful in fact, and that undoing two decades of case law would therefore be fatal to his claim. The courts long ago added the "reasonable belief" gloss to Title VII's anti-retaliation provision in recognition of the fact that the law is sometimes unsettled or uncertain and in order not to chill good faith protest. *See Sias*, *supra*, and *Berg v. LaCrosse Cooler Co.*, 612 F.2d 1041, 1045-46 (7th Cir. 1980). The objective limitation of reasonability is, however, a necessary counterpoint to deter spurious claims. It is paradoxical for Petitioner to argue that the anti-retaliation provisions should be read literally when a literal reading is equally fatal to his case.

One further word about reasonable belief: the protected characteristic under the ADA — disability as the statute defines it — is often more difficult to assess than such characteristics as race, gender, or ethnicity. The very complexity of the concept of disability under the ADA is a powerful argument for requiring, except in the most obvious cases, some form of preliminary inquiry before one can claim a reasonable belief that employer conduct constitutes disability discrimination. Many American men and women have some physical or medical condition which limits their life activities in some way. To allow virtually any employee (or worse yet, any interloper like Talanda) to protest virtually any workplace change on the basis of the merest suspicion that the ADA has been violated would create an open invitation to meritless retaliation claims.

Finally, even if the Court believes that the construction of section 12203 might deserve its attention, that issue is one that the Court should leave for another day. Seven years after the ADA took effect, no unique jurisprudence of retaliation has developed under that Act, and no Circuit Court of Appeals has remarked upon the necessity for such a jurisprudence or upon any conflict in the Circuits as to how the section should be applied. The usual conditions for this Court's intervention in resolving a question of statutory construction, absent extraordinary public urgency, are completely absent.

II.

THIS CASE IS NOT AN APPROPRIATE VEHICLE FOR ADDRESSING THE QUESTIONS PRESENTED BY THE PETITION.

Furthermore, it would be unwise for the Court to explore the meaning of the ADA's anti-retaliation provision (and thereby affect Title VII jurisprudence as well) in this case, which is in so many ways an unusual case with an undeserving plaintiff. Petitioner is not himself the victim of the alleged discrimination. Rather, he was her manager, who took it upon himself, unbidden, to "assist" the alleged victim, even though she had not complained, did not know of the reason for the allegedly discriminatory job change until he told her, and would have been placed in the position she had originally applied for and desired by the alleged act of discrimination. Overly's directive was merely that Bellson be laterally reassigned from counter service to food preparation, and thus did not constitute an actionable adverse action. Overly did not direct Talanda to discharge Bellson or to make any other change in the conditions of her employment. Overly simply did not want Bellson's denture-less smile greeting customers about to order KFC's products at the counter. The district court correctly observed that a reasonable layperson could not have concluded that this order was discriminatory. App. at 71-72.

Talanda, however, was not just any layperson, but an experienced store manager who knew of the company channels through which he could seek guidance or complain of discrimination. He did not use them. Indeed, he never "opposed" the alleged discrimination except by refusing to carry out Overly's order without telling her of either his refusal or his reasons. Finally, when he was summoned to a meeting at which he might naturally have been expected to explain why he

opposed Overly's order, he remained silent — a course of action which, in combination with his covert taping, strongly suggests that he was inviting his firing so he could seek a windfall in litigation.

No new legal standard has been applied to Talanda. Given his experience and position, the time-tested criterion that he have a reasonable belief that the conduct he was opposing was actually unlawful required him either to tell Overly or other KFC management of his suspicion that the reassignment order violated the ADA so that management could evaluate the issue, or to seek out some form of legal confirmation (*e.g.*, advice from the EEOC) that the ADA protected Bellson under these conditions. His failure to do so dooms his attempt to invoke the ADA's protection against retaliation.

CONCLUSION

Neither the issues presented by the petition nor the case in which they are presented are worthy of this Court's attention on certiorari.

Respectfully submitted,

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